

BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C.

**RECEIVED**

MAR 29 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No. 98-196

RM-9304

In the Matter of

Amendment of Section 73.202(b)  
Table of Allotments  
FM Broadcast Stations  
(Cross Plains, Texas et al.)

To: The Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**REPLY TO OPPOSITION TO MOTIONS TO STRIKE**

Wagonwheel Broadcasting of Santa Anna ("Wagonwheel"), by counsel, in accordance with 47 CFR §1.45(b), hereby replies to the *Response to Motions to Strike* ("Opposition")<sup>1</sup> filed in the above-referenced proceeding by First Broadcasting Management, L.L.C. ("FMB"), WBAP/KSCS Operating, Ltd., Blue Bonnet Radio, Inc., Hunt Broadcasting, Inc., Gain-Air, Inc. and KCYT-FM License Corp. (collectively referred to as the "Joint Parties") on March 18, 1999. In support thereof, the following is stated:

1. The Joint Parties do not contest the fact that their reply pleadings were both filed late according to the rules contained in 47 CFR §1.45(b). Instead, the Joint Parties advance the absolutely ridiculous 'argument' that Section 1.45

<sup>1</sup> For whatever reason, the Joint Parties have cast their pleading as a generic 'Response'. However, Since Wagonwheel's initial pleading was a motion, it is more apropos to refer to the responsive document as an 'opposition' in accordance with 47 CFR §1.45(a).

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does not apply and that there are no pleading deadlines at all governing motion cycles in Table of Allotment cases. As stated by the Joint Parties:

Contrary to Wagonwheel's position, the Commission's rules do not provide a deadline for the filings objected to by Wagonwheel.

Opposition, p. 1 (emphasis supplied). By this line of reasoning, any party can file any sort of pleading at any time in an allotment proceeding, without regard for the orderly operation of the Commission's decision-making processes. The Joint Parties suggested approach is not only contrary to the established law, it is wrongheaded and would result in an administrative nightmare for the Commission.

2. The documents opposed by Wagonwheel were both simple motions. On January 20, 1999, the Joint Parties filed a Joint Motion to Strike Reply Comments. Later on January 27, 1999, the Joint Parties filed a Motion for Leave to Supplement Record. These were not comments or reply comments or any other fanciful creation of the Joint Parties. These pleadings and all ensuing pleadings were subject to whatever deadline rules exist for motions.

3. According to the Joint Parties, Section 1.45(b) which sets out the rules for filing replies to motions, does not apply. Instead, they argue, these rules are superseded by more specific deadline rules:

In short, where a more specific rule provision dealing with filing deadlines exists, as one does for rule making proceedings, the Commission will follow the specific rather than the general rule.

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Opposition, p. 2, ¶ 2. According to the Joint Parties these “specific” rules can be found somewhere in “Part 1, Subpart C of 47 C.F.R. (§ 1.398 et seq.)”. Exactly where, however, we are not told.

4. So far, while perhaps not the most intelligent position to advance, given the fact that the Commission does have specific deadline rules for motions, at least the argument is within the bounds of reason. We soon leave the planet Earth, however, when we discover that there are no deadline rules for motions in the sections pointed to by the Joint Parties. Indeed, as the Joint Parties elsewhere try to assert: “...the Commission’s rules do not provide a deadline”<sup>2</sup> for these filings. But if there are no deadlines rules, there cannot be any more “specific” rules than those contained in Section 1.45 of the Commission’s Rules. Therefore, the rules governing motions in Section 1.45 must apply. In sum, the Joint Parties claim the existence of more specific deadline rules than those found in Section 1.45 and then not only fail to show us these rules, they claim that there are no rules. The Joint Parties’ argument collapses under the weight of its own odious contrivance.

5. The Joint Parties finish off their work with one of the most meaningless string citations one is ever likely to encounter this side of law school.<sup>3</sup> Not a single case addresses the procedural rules governing motions filed in rulemaking proceedings. Instead, in nearly every case, the Commission

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<sup>2</sup> See Paragraph 1, *supra*. See also, Opposition, p. 4, ¶ 5: “Nowhere does the rule [Section 1.415] set time limits on the filing of other pleadings [other than comments and reply comments].

<sup>3</sup> Opposition, p. 3, ¶ 3.

tossed out the exact sort of filing that the Joint Parties are attempting to insert into this proceeding.

6. On the other hand, the procedural and deadline rules contained in Section 1.45 have been applied in numerous allotment proceedings. In Bloomington and Nashville, Indiana, 4 FCC Rcd 5765, 5768, n. 2 (Allocations Branch, 1989), the Commission squarely held that the deadline rules contained in Section 1.45 do in fact apply to oppositions to motions in rulemaking proceedings. In Vacaville and Middletown, California, 6 FCC Rcd 143, 144, ¶ 11 (Policy and Rules Division, 1991), the Commission applied Section 1.45(b)'s limitation on matters properly included in a reply. In East Hemet, Indio, Rancho California, Sun City, and Temecula, California, 4 FCC Rcd 7895, 7898, n. 3 (Allocations Branch, 1989), the Commission used Section 1.45(c) to reject late-filed supplemental comments. These cases spell out the plain fact that motions made in rulemaking proceedings are indeed governed by the provisions of Section 1.45 of the Commission's Rules.<sup>4</sup>

7. The Joint Parties' analysis of Section 1.415 is also curious. Here they fall into the trap of allowing the exception to swallow the rule. Section 1.415(d) specifically prohibits additional comments:

No additional comments may be filed unless specifically requested or authorized by the Commission.

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<sup>4</sup> These cases also dismiss the Joint Parties' claim that they "...made a good faith effort to determine whether there was a filing deadline and found no precedent for applying Section 1.45...." Opposition, p. 5, n. 3.

47 CFR §1.415(d). However, the Joint Parties seize upon the “or authorized” language to misconstrue the rule to mean that additional comments should be filed at any time based on only a vague hope that the Commission will ultimately “authorize” the untimely filings.<sup>5</sup> Not only is this argument utter nonsense, the Joint Parties go further and argue that there are no deadlines at all for these additional filings.<sup>6</sup> Needless to say, adoption of such a scheme would only bring chaos to Commission rulemaking proceedings. The Commission should use this opportunity to make it clear to future parties that firm deadline rules do exist and must be followed by parties in allotment proceedings.

8. The Commission has longed warned against developing a habit of making bizarre engineering showings and arguments before the Commission. See Abacus Broadcasting Corp., 8 FCC Rcd 5110 (Rev. Bd. 1993), *Separate Statement of Norman B. Blumenthal* at 5117. In the present case, rather than owning up to the fact of having filed their pleadings and showings late, the Joint Parties have resorted to the most tortured reading of the Commission’s Rules in the hopes of saving the day. That this took a small platoon of lawyers operating out of three different law firms just boggles the mind. This ersatz conduct only serves to undermine the seriousness and credibility of the Joint Parties in this proceedings.

9. The only meritorious aspect of the Opposition is that the Joint Parties have mercifully combined their work into a single pleading, allowing this document to end both pleading cycles. To waste any further public and private

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<sup>5</sup> Opposition, p. 4-5, ¶ 4.

<sup>6</sup> Opposition, p. 4, ¶ 5.

resources with the Joint Parties' frivolous arguments would border on the criminal. Thus, Wagonwheel will refrain from a further motion to strike based on the failure of the Joint Parties to file even this Opposition in a timely manner.<sup>7</sup>

10. The Joint Parties have shown a reckless disregard for the orderly operation of the Commission's Rules. Their antics should not be tolerated. Therefore, the late documents should be stricken for any and all purposes of this rulemaking.

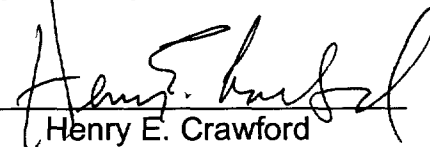
**WHEREFORE**, Wagonwheel Broadcasting of Santa Anna respectfully requests that the Response to Motions to Strike filed by First Broadcasting Management, L.L.C. ("FMB"), WBAP/KSCS Operating, Ltd., Blue Bonnet Radio, Inc., Hunt Broadcasting, Inc., Gain-Air, Inc. and KCYT-FM License Corp., be rejected and stricken from the record.

March 29, 1999

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Respectfully Submitted,

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By:   
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<sup>7</sup> To the extent that the instant opposition concerns Wagonwheel's February 24, 1999 Motion to Strike, it should have been filed on March 10, 1999 and is, therefore, 8 days late in accordance with Section 1.45(a).

## CERTIFICATE OF SERVICE

I, Henry E. Crawford, do hereby certify that copies of the foregoing Reply to Opposition to Motions to Strike have been served by United States mail, postage prepaid this 29th day of March, 1999 upon the following:

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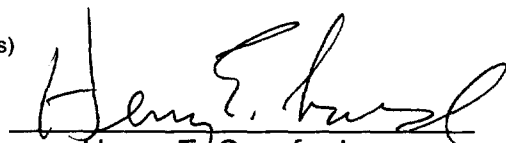
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